No. 12711

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED TATE, *Appellant,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA and ROBERT A. HEINZE, Warden of Folsom Prison, *Appellees.*

BRIEF FOR APPELLEES

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STATEMENT OF THE CASE

The appellant herein sought to file a petition for the issuance of a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division. (Tr. 18.) The Honorable Dal M. Lemmon, judge of said court, on June 26, 1950, denied to petitioner the right to file the petition *in forma pauperis* on the ground that there was nothing alleged therein which presented "exceptional circumstances of peculiar urgency" which entitled him to the issuance of the writ. (Tr. 20.) On July 25, 1950, a "Notice and Application for a Rea Hearing" [sic]

was filed in said matter (Tr. 21-26) which was denied by said court on July 24, 1950 (Tr. 34). On August 18, 1950, appellant filed a document entitled "Notice and Application, and Motion on Petition for and Appeal on Pauperis" with said District Court (Tr. 37-42) and on August 18, 1950, Hon. Dal M. Lemmon, United States District Judge, signed a certificate of probable cause and ordered that an appeal might be taken in said matter. (Tr. 44-45.)

ARGUMENT

I. The Procedure Followed by the District Court in Denying the Petition Without a Hearing Was Proper Under the Statutes

In the case of *Dorsey* v. *Gill,* 148 F. 2d 857 (cert. denied 325 U. S. 890) the United States Court of Appeals for the District of Columbia, examined at great length the office and nature of a writ of habeas corpus and the procedure to be followed in federal courts upon an application therefor. The opinion, which is exhaustively annotated, summarizes the procedure which may be followed by a district court on a petition for the issuance of a writ of habeas corpus and states (pp. 865-866):

> "There are at least ten such possible alternatives, as follows: (1) When a petition is presented to a judge with a request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; or (2) he may in the interest of justice—if the petition is insufficient in substance—require petitioner to amend it; or

he may require him to show—if the judge is not otherwise informed—whether petitioner has made a prior application and, if so, what action was had on it; (3) he may issue a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted and upon the return, may grant or deny leave to file; (4) after a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith; (5) if, upon consideration of a petition which has been filed, it appears that the petitioner is not entitled to the writ, the court should refuse to issue it; (6) if the allegations of the petition are inconclusive, the judge may issue a rule to show cause why a writ should not be granted, to which the relator may respond; (7) if the procedure suggested in (6) is followed, the facts on which the opposing parties rely having been exhibited to the judge, he may find that no issue of fact or law is involved and may then refuse to grant the writ, in which event it is not necessary to hold a hearing; (8) on the other hand, if the procedure suggested in (6) is followed, the judge may find that the facts admitted—in response to the order to show cause—entitled the petitioner to the writ and to a discharge, forthwith, as a matter of law; or (9) he may find that an issue is involved; in which event he should grant the writ and require a hearing, the petition and traverse being then treated as, together, constituting the application for the writ, the return to the rule as setting up the facts thought to warrant its denial, and the issues of fact, thus emerging, should be tried as required by that statute; (10) if, as a matter of

convenience, the judge—without determining whether the petition is sufficient—issues the writ, he may then, upon the return, hear and dispose of the whole matter at once."

The procedure suggested under No. (1) supra, was precisely the procedure followed by the Honorable Judge Dal M. Lemmon in the instant matter.

In commenting upon the abuse of the writ of habeas corpus and the necessity of the court to which a petition is addressed determining preliminarily whether justice is to be served by the issuance of the writ, the court in *Dorsey* v. *Gill,* 148 F. 2d 857, further stated (pp. 862-3):

"Today, in the District of Columbia, we find a similar contrast. Here, petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriage of justice, but also as a device for harrassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5 * * *. The number has increased most rapidly during the last three years, since the Supreme Court's decision in *Walker* v. *Johnston,* and since one of the opinions filed in this Court in the Rosier case, admonished the District Court that: 'Administrative inconvenience, even occasional abuse of the facilities of the courts, is but a small price

to pay for the previous right of access to the courts guaranteed under our system of government *to all who claim to be wronged'* (Italics supplied.) Thus, if all petitions presented during this period of three and one-third years had been filed and writs issued, as is the practice in some districts, the judges of the District Court would have been required to hold 815 hearings upon returns made, in each instance, by the custodial officers in whose control these persons were held."

A similar situation would have prevailed in the case at bar for in appellant's "Notice and Application and Motion on Petition for and Appeal on Pauperis" are listed the previous actions taken by him (Tr. 38), judicial notice of which may be taken by this court (*Knight* v. *People,* 60 F. Supp. 164). These are properly reflected by the records of the state and federal courts as follows:

1/ 4/46 Judgment of conviction on original charge affirmed and reported in *People* v. *Tate,* 72 Cal. App. 2d 467, 164 P. 2d 556.

1/14/46 Petition for Rehearing in Fourth District Court of Appeal denied (*People* v. *Tate,* 72 Cal. App. 2d 472, 164 P. 2d 556).

4/ 3/47 Order denying petition for writ of error coram nobis affirmed by Fourth District Court of Appeal, State of California reported in *People* v. *Tate,* 78 Cal. App. 2d 894, 178 P. 2d 470.

4/14/47 Petition for Rehearing denied by Fourth District Court of Appeal (*People* v. *Tate,* 78 Cal. App. 2d 896, 178 P. 2d 470).

5/ 1/47	Petition for Hearing in California Supreme Court denied (*People* v. *Tate,* 78 Cal. App. 2d 896, 178 P. 2d 470).
11/14/47	Petition for writ of habeas corpus filed with the Third District Court of Appeal of the State of California, 3 Crim. 2049, denied without opinion.
12/11/47	Petition for Hearing in 3 Crim. 2049 in the California Supreme Court denied without opinion.
6/14/48	Petition for writ of certiorari from 3 Crim. 2049 denied without opinion (Misc. 507, Oct. Term 1947), 334 U. S. 842.
10/11/48	Petition for Rehearing in United States Supreme Court denied in Misc. 507 (Oct. Term 1947), 335 U. S. 839.
12/13/48	Petition for writ of habeas corpus filed in United States District Court Northern Dist. Calif. Northern Division denied (No. 6068).
2/ 1/49	Request for allowance of appeal in No. 6068 denied by Ninth Circuit Court of Appeals.
2/23/49	Petition for Rehearing denied—Ninth Circuit Court.
6/23/49	Petition for writ of habeas corpus denied by Sacramento Superior Court No. 17323.
10/25/49	Petition for writ of habeas corpus filed with the Third District Court of Appeal of the State of California, 3 Crim. 2180, denied without opinion.

11/21/49 Petition for Hearing by the California Supreme Court in 3 Crim. 2180, denied without opinion.

2/13/50 Petition for writ of certiorari to review 3 Crim. 2180 denied by the United States Supreme Court (301 Misc., Oct. 1949 Term), 337 U. S. 903, 94 L. Ed. 382.

3/27/50 Petition for Rehearing denied by the United States Supreme Court (301 Misc., Oct. 1949 Term), 94 L. Ed. 509.

5/ 1/50 Petition for Rehearing denied by the United States Supreme Court (301 Misc., Oct. 1949 Term), 94 L. Ed. 723.

The petition on its face in the instant matter presents no grounds which have not been presented hitherto in the various actions filed by appellant and no grounds which were not within his knowledge at the time of the original appeal in the state courts (*Salinger* v. *Loisel,* 265 U. S. 224, 230; *Darr* v. *Burford,* 339 U. S. 200). It is apparent that it does not comply with the provisions of Section 2244, Title 28, United States Code.

Moreover under the provisions of Section 2254, Title 28, United States Code, which reads as follows:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances

rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

the appellant herein has not exhausted the remedies available in the state courts. Appellant still has the right to raise all the points here attempted to be presented in the courts of California by means of a petition for writ of habeas corpus which is an available state corrective process. (*Limiting the Abuse of Habeas Corpus,* 8 F. R. D. 171, 176-7; *Smyth* v. *Stonebreaker* (4 Cir.), 163 F. 2d 498, 501.)

There is no showing made on the face of the petition that there were any circumstances rendering such process which is available in the courts of California ineffective to protect the rights of the prisoner.

Darr v. *Burford,* 339 U. S. 200, 70 S. Ct. 587.

It should be noted that the appellant did not attempt to seek a petition for hearing in the Supreme Court of the State of California from the affirmance of his original conviction by the Fourth District Court of Appeal in the case of *People* v. *Tate,* 72 Cal. App. 2d 467, nor did he petition the United States Supreme Court for certiorari in said matter (*Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587; *Ex Parte Hawk,* 321 U. S. 114, 64 S. Ct. 448) and each of the points raised in the instant petition could have been brought

to the courts' attention on the original appeal from the judgment of conviction.

II. The Allegations of the Petition for Writ of Habeas Corpus Were Insufficient as Grounds for the Issuance of a Writ

Although appellant herein was represented by counsel at the trial of his original action and on the hearing on the writ of error *coram nobis* in the state courts he appeared in *propria persona* on the appeals and is appearing in *propria persona* in the present matter. The points raised in his opening brief on this appeal have hitherto been considered by both the state and federal courts and have been held to be without merit.

Appellant contends that the judgment and commitment under which he is being confined in Folsom State Prison, State of California, is void apparently on the following grounds:

(1) That there was no trial as "your petitioner has never faced a complaining witness" (Tr. 2);
(2) There was no proof of his prior convictions adduced in evidence at his trial (Tr. 2, 5-6);
(3) That the testimony was perjured (A. O. B. 2-6);
(4) That his guilt was not established beyond a reasonable doubt (A. O. B. 11);
(5) That Section 644 of the Penal Code of the State of California is a violation of the Federal Constitution (Tr. 13).

These points have been fully considered by the opinions of the District Court of Appeal of the State

of California in and for the Fourth Appellate District in the cases of *People* v. *Tate,* 72 Cal. App. 2d 467, 164 P. 2d 556, and *People* v. *Tate,* 78 Cal. App. 2d 894, 178 P. 2d 470.

From the case of *People* v. *Tate,* 72 Cal. App. 2d 467, 164 P. 2d 556, it appears that the defendant and appellant herein was charged in Count I of an information with the crime of grand theft, in that on May 7, 1945, he did "wilfully, unlawfully and feloniously take and steal from the person of one Robert Neeley certain personal property, to wit, lawful money of the United States of America" in violation of Sections 484 and 487 of the Penal Code of the State of California. In Counts II, III and IV he was charged with prior convictions of felonies and the serving of prison terms thereunder. Defendant pleaded not guilty to Count I and admitted the prior convictions as charged. After a jury trial at which the defendant was represented by counsel, the defendant and appellant herein was found guilty as charged; the court adjudged him to be an habitual criminal and he was sentenced to the state prison for the term prescribed by law. On appeal the entire record was reviewed by the appellate court and with relation to the points raised by appellant herein, the court stated in part:

> "Most of the claimed errors will be considered under the question whether the evidence is sufficient to support the verdict. As we view the defendant's argument, it is his contention that the testimony of Neeley was not sufficient to establish the corpus delicti. It is argued that Neeley

did not know that defendant took the money from his pocket. There is direct evidence of two other witnesses to the effect that they saw the defendant take the money from Neeley's pocket. This was sufficient proof of that fact without the testimony of Neeley.

It is next argued that the testimony of the witnesses for the defense established, as a matter of law, a reasonable doubt as to his guilt. A mere statement of the testimony of the witnesses shows only a conflict in the evidence. There was substantial evidence, if believed by the jurors, and of which they are the judges, to justify the finding of guilty as to the first count. (*People* v. *Hennessey,* 201 Cal. 568 (258 P. 49).) We see no merit to this argument.

The last contention is that defendant was improperly adjudged an habitual criminal. The second count of the information charged that he had been previously convicted of a felony, to wit, violation of the Drug Act in the State of Utah, and that he served a term of imprisonment in the United States prison at Leavenworth, Kansas.

The third count charges that in Oregon, he was convicted of a felony, to wit, the crime of assault with intent to kill, and served a term of imprisonment in the Oregon State Prison.

In the fourth count it is charged that he was previously convicted in the State of Utah with a felony, to wit, the crime of burglary (second degree), and that he served a term of imprisonment therefor in the Utah State Prison. On arraignment, when he was represented by counsel, defendant fully admitted the three prior convictions as

charged and thereafter went to trial upon the plea of not guilty as to the charge set forth in the first count. On June 22, 1945, at the time of the arraignment for judgment, the court adjudged the defendant to be an habitual criminal, as provided by Penal Code section 644, subdivision (a). The date of the commission of the offense and the date of sentence were both prior to the effective date of the amendment to that section which was enacted on June 16, 1945, and went into effect on the 91st day thereafter. (Stats. 1945, chap. 934.) Under that section, as it then existed, 'Every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal penitentiary, either in this State or elsewhere, of the crime of robbery, burglary * * * assault with intent to commit murder, * * * felonious assault with a deadly weapon, * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life.' The constitutionality of this section has been determined on many occasions * * * (citations) * * *.

The prior conviction of violation of the Drug Act is not a felony enumerated in section 644, subdivision (a), *supra,* and is not, therefore, a prior conviction which will serve as a basis for an adjudication of habitual criminality. However, assault with intent to kill and burglary are both crimes enumerated in that section and the prior conviction of such, with the service of prison terms therefor, does serve as such a basis. The defendant

was properly found to be twice previously convicted of, and served prison terms for, crimes enumerated therein and he was properly adjudged to be an habitual criminal thereunder.

We assume, from defendant's brief, that it is his contention that the full faith and credit clause of article IV of the federal Constitution was violated because of the failure of the prosecution to introduce properly authenticated documents to support the finding that defendant suffered the prior convictions above mentioned. We are unable to see that any question of violation of such constitutional provision arises here, first, because nowhere in the record does it show that any documents or records whatever were introduced; secondly, defendant admitted the charges of those prior crimes and the service of sentences thereunder, therefore, it was not necessary that any further evidence be taken in reference thereto. (*People* v. *Stone,* 69 Cal. App. 2d 533, 535, (159 P. 2d 701).)

We have studied the record of this case carefully and have been unable to find any errors therein. Defendant had a fair and impartial trial. The evidence of his guilt was overwhelming."

This opinion was reaffirmed by the court's decision in the case of *People* v. *Tate,* 78 Cal. App. 2d 894, 178 P. 2d 470, which involved an appeal from the denial of a petition for writ of error *coram nobis* filed in the Superior Court of the State of California in and for the County of Imperial. At this hearing, the appellant herein was represented by counsel and appealed from

the order denying the petition. In its opinion upholding the ruling of the trial court, the Fourth District Court of Appeal stated (78 Cal. App. 2d 894, 895-6):

"The appellant argues that he was denied his statutory and constitutional rights; that the original information was not sufficient; that 'there was not a *corpus delicti* proven'; that it was not proved that there had been a crime committed; that the court made erroneous rulings on the admission of evidence; and that the fact that he was an habitual criminal was not established. All of these matters could have been raised on the appeal from the judgment and practically all, if not all, were so raised. It is well settled that under such circumstances a second review cannot be secured through the writ here relied upon. (*People* v. *Mooney,* 178 Cal. 525 (174 P. 325); *People* v. *Egan,* 73 Cal. App. 2d 894 (167 P. 2d 766).) In principle, every point here raised was covered, adversely to the appellant, in the opinion in the case last cited.

The appellant further contends that the judgment was based upon perjured testimony, and that his counsel at the time of trial failed to bring out the fact that the testimony was perjured. There is nothing in the record to sustain this contention. At the hearing on this petition in the trial court, while there was considerable argument and the appellant made several statements as to his contentions, no evidence was produced or offered. While in his statements the appellant complained that the transcript of the evidence taken at the preliminary examination was not produced and introduced at the trial, and that the variance between certain

testimony as given at the preliminary hearing and as given at the trial constituted perjury, it was not pointed out just what testimony was claimed to be perjured and no evidence was introduced for the purpose of establishing such a fact.

In his briefs on this appeal, the appellant refers to and relies on certain testimony which purports to be a quotation from the record at the preliminary hearing and other testimony from the record at the time of the trial. Assuming that this record was properly before us, the matters referred to either constitute slight variances in testimony concerning immaterial matters, or relate to things concerning which there was an abundance of other evidence. Nothing now presented by the appellant would justify any interference with the judgment of conviction. (*People* v. *Kirk,* 76 Cal. App. 2d 496 (173 P. 2d 367).)

Nothing appears to indicate that the appellant did not have a fair and impartial trial and, as this court said in deciding the appeal from the judgment, 'the evidence of his guilt was overwhelming'."

It has long been a settled rule that the writ of habeas corpus cannot be used for the purpose of proceedings in error and that the sufficiency of the evidence to support the conviction may not be inquired into under the writ.

Burall v. *Johnson,* 134 Fed. 614, Cert. Den., 63 S. Ct. 1327, Rehearing Den., 64 S. Ct., 319 U. S. 768, 30, 320 U. S. 810, Rehearing Den., 64 S. Ct. 187, 320 U. S. 812;

Sunal v. *Large,* 332 U. S. 174, 67 S. Ct. 1588.

The petition for writ of habeas corpus in the instant matter sets forth no facts showing that perjured testimony was knowingly used by the prosecution and the state court in *People* v. *Tate,* 78 Cal. App. 2d 894, recognized that although appellant was afforded an opportunity to produce such evidence he failed to adduce any evidence in support of this allegation. Therefore, this point is without merit.

Hinley v. *Burford* (10 Cir.), 183 F. 2d 581;
Casebeer v. *Hudspeth* (10 Cir.), 121 F. 2d 914;
Story v. *Burford* (10 Cir.), 178 F. 2d 911;
Cobb v. *Hunter* (10 Cir.), 167 F. 2d 888.

With relation to appellant's contentions that there was no proof of his prior convictions adduced at his trial, it is apparent that where a defendant pleads guilty to a count of an information charging certain prior convictions and the service of sentence therefore in a state or federal prison it is unnecessary for evidence to be adduced in support of such prior convictions.

People v. *Stone,* 69 Cal. App. 2d 533, 159 P. 2d 701;
24 *C. J. S.* Sec. 1964, pp. 1157-8.

Section 644 of the Penal Code of the State of California has been held to be constitutional both under the state and federal constitutions many times as well as have other state and federal statutes providing for increased punishment for subsequent offenses.

People v. *Stone,* 69 Cal. App. 2d 533, 159 P. 2d 701;
In re Schunke, 81 Cal. App. 2d 588, 184 P. 2d 700;

People v. *Richardson,* 74 Cal. App. 2d 542, 169 P. 2d 47;
People v. *Israel,* 91 Cal. App. 2d 775, 206 P. 2d 69;
People v. *Biggs,* 9 Cal. 2d 508, 71 P. 2d 214, 116 ALR 205;
People v. *Dutton,* 9 Cal. 2d 505, 71 P. 2d 218, App. dismissed;
Dutton v. *People,* 302 U. S. 656;
In re Rosencrantz, 205 Cal. 534, 271 P. 902;
People v. *d'A Phillipo,* 220 Cal. 620, 32 P. 2d 962.

In *Darr* v. *Burford,* 339 U. S. 200, 218, 70 S. Ct. 587, 597, the United States Supreme Court stated:

> "A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the State so departed from constitutional requirements as to justify a federal court's intervention to protect the rights of the accused. The petitioner has the burden also of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist."

This it is apparent appellant has not done in the case at bar.

CONCLUSION

It is submitted that the district court properly exercised its discretion in concluding that this was not one of those "rare cases where exceptional circumstances of peculiar urgency are shown to exist"

and the meager allegations contained in the petition unsupported by facts bring this matter within the language of *Boyd* v. *O'Grady,* 121 F. 146, 147, and cases therein cited:

> "the power conferred on a federal court to issue a writ of habeas corpus to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist."

It is therefore respectfully submitted that the order of the district court denying appellant the right to file the petition for writ of habeas corpus in the present matter should be affirmed.

Dated: Sacramento, California, December 8, 1950.

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